STATE OF MICHIGAN

COURT OF APPEALS

TIM EDWARD BRUGGER II, Plaintiff-Appellee,	FOR PUBLICATION May 15, 2018
v	No. 337394 Midland Circuit Court
MIDLAND COUNTY BOARD OF ROAD COMMISSIONERS, Defendant-Appellant.	LC No. 15-002403-NO Advance Sheets Version

Before: SHAPIRO, P.J., and M. J. KELLY and O'BRIEN, JJ.

SHAPIRO, P.J. (*concurring*).

As I stated in the majority opinion, *Streng v Bd of Mackinac Co Rd Comm'rs*, 315 Mich App 449; 890 NW2d 680 (2016), should not be applied retroactively. I write separately to set forth my view that *Streng* was wrongly decided and that compliance with either of the two notice-of-claim statutes suffices to preserve the claim.

Streng presented a highly unusual circumstance in that there were two statutes that set forth *inconsistent* requirements for a notice of claim against a county road commission. The Court in *Streng* concluded that it had to choose one statute over the other, and it elevated MCL 224.21(3), the provision within the county road act, MCL 224.1 *et seq*., over MCL 600.1404, the provision within the governmental tort liability act, MCL 691.1401 *et seq*. *Streng*, 315 Mich App at 362-363. The Court's conclusion rested upon the principle of statutory interpretation that between a general and specific statute the more specific statute controls. It could, of course, have reached the opposite conclusion by following the interpretive principle that a later-adopted statute controls over an earlier-adopted conflicting statute.[1] Choosing between the statutes is therefore, a somewhat arbitrary process.[2]

[1] "Statutes enacted by the Legislature on a later date take precedence over those enacted on an earlier date." *Baumgartner v Perry Pub Sch*, 309 Mich App 507, 521; 872 NW2d 837 (2015).

[2] The dissent does not dispute that MCL 691.1404 was adopted after MCL 224.21. Nevertheless, the dissent argues that because MCL 691.1402 was amended in 2012, see 2012 PA 50, it should be considered the later-adopted provision. However, the 2012 amendment of MCL 691.1401 addressed matters wholly unrelated to notice to road commissions. The relevant provision in MCL 691.1402(1), i.e., the sentence referring to MCL 224.21, was part of the *original* version of

Streng, however, did not consider *Apsey v Mem Hosp*, 477 Mich 120, 123; 730 NW2d 695 (2007), which held that such a choice need not be made.[3] *Apsey* was the last time Michigan was faced with the issue of two conflicting statutes governing the same procedural requirements. The unfortunate history of that case and the Supreme Court's ultimate resolution of it provide much guidance. *Apsey* involved a medical malpractice case brought in 2001. The plaintiff filed an affidavit of merit, as required by MCL 600.2912d(1) signed by a qualified out-of-state physician. *Id*. at 124. It was undisputed that the document was properly notarized and effective in Michigan under the relevant provision—MCL 565.262—of the Uniform Recognition of Acknowledgements Act, MCL 565.261 *et seq*. However, the defendant argued that the affidavit was not effective in Michigan because it did not satisfy MCL 600.2102(4). *Id*. at 125. That statute required that for an out-of-state affidavit to be effective in Michigan, it must be accompanied by a certification carrying the seal of the county clerk where the document was signed, confirming that the signing notary was in fact a notary.

Until *Apsey* was decided in 2007, courts had not relied on or even cited MCL 600.2102(4) during the 23 years that the courts had been reviewing the adequacy of notices of claim.[4] Instead, the bench and bar had, since the adoption of the affidavit-of-merit requirement, consistently relied on and enforced the MCL 565.262 notary requirements. Following the *Apsey* decision, medical malpractice defendants all over the state moved to dismiss pending cases because the affidavit of merit lacked certification of the notary's qualifications from the local court. Many of these cases were subject to dismissal with prejudice because the period of limitations had run, and in *Scarsella v Pollak*, 461 Mich 547, 549-550; 607 NW2d 711 (2000), the Supreme Court had previously held that when an affidavit of merit was shown to be defective, the filing of the complaint did not toll the statutory limitations period.

Ultimately, however, the Supreme Court in *Apsey* rejected the idea that one of the two conflicting statutes had to prevail over the other. Instead, it concluded that in passing two statutes designating proper procedure, the Legislature had provided "alternative method[s]" to accomplish the task. *Apsey*, 477 Mich at 134. In other words, rather than viewing the two statutes as "conflicting" with one being "right" and the other being "wrong," the Court concluded that compliance with *either* of the statutes was sufficient. *Id*. at 124.

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the GTLA enacted in 1964, see 1964 PA 170, and has never been amended. The relevant provision reads exactly as it did when *Crook* was decided in 1972. The 2012 amendments of MCL 691.1402 are not relevant to the relationship of MCL 691.1404 and MCL 224.21.

[3] The *Streng* Court should not be faulted for not noting the significance of *Apsey* because neither party cited it in their briefs.

[4] It appears that the last time any version of MCL 600.2102(4) had been relied on to dismiss a case—see 1915 CL 12502—was in *In re Alston's Estate*, 229 Mich 478; 201 NW 460 (1924). In *Wallace v Wallace*, 23 Mich App 741, 747; 179 NW2d 699 (1970), the Court agreed that the relevant affidavit did not satisfy MCL 600.2102 but concluded that such an error could be corrected *nunc pro tunc* and was not dispositive of the case.

As Justice YOUNG stated in his concurrence:

> This is a case in which the majority and the dissent offer two compelling but competing constructions of [two statutes], and, in my view, neither construction is unprincipled. Both sides invoke legitimate, well-established canons of statutory construction to justify their respective positions. In short, this is a rare instance where our conventional rules of statutory interpretation do not yield an unequivocal answer regarding how to reconcile the provisions of the two statutes that appear to conflict. [*Id*. at 138-139 (YOUNG, J., concurring).]

After inviting the Legislature to "dispel much of the confusion generated" by the two statutes, Justice YOUNG concluded that "until that time, I favor a resolution that is least unsettling and disruptive to the rule of law in Michigan"; for that reason, he concurred in the reversal of the Court of Appeals. *Id*. at 141.

Apsey unmistakably leads to the conclusion that compliance with the presuit notice requirements of *either* MCL 691.1404(1) *or* MCL 224.21(3) is sufficient to proceed to suit. I believe that *Streng* was wrongly decided and should have adopted that view.

/s/ Douglas B. Shapiro